

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

RICHARD F.K.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

Case No. 3:20-cv-05614-TLF

ORDER REVERSING AND
REMANDING DEFENDANT'S
DECISION TO DENY BENEFITS

Plaintiff has brought this matter for judicial review of defendant's denial of his application for disability insurance benefits.

The parties have consented to have this matter heard by the undersigned Magistrate Judge. 28 U.S.C. § 636(c); Federal Rule of Civil Procedure 73; Local Rule MJR 13.

I. ISSUES FOR REVIEW

1. Did the ALJ Err at Step Two of the Sequential Evaluation Process?

II. BACKGROUND

On September 22, 2017, Plaintiff filed an application for DIB, alleging therein a disability onset date of November 5, 2016, although he later amended this onset date to November 16, 2019. Administrative Record ("AR") 177, 180, 195. Plaintiff's application for DIB was denied upon official review and upon reconsideration. AR 108, 116. A hearing was held before ALJ Rebecca L. Jones on March 18, 2019. AR 30. On March

27, 2019, the ALJ issued a decision finding that Plaintiff was not disabled. AR 24. On April 21, 2020, the Social Security Appeals Council denied Plaintiff's request for review. AR 1–4.

III. STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of Social Security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir. 2017). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (internal citations omitted).

IV. DISCUSSION

In this case, the ALJ found that Plaintiff had the medically determinable impairments of degenerative disc disease of the lumbar and cervical spine, degenerative joint disease of the right shoulder, obstructive sleep apnea, essential hypertension, gastroesophageal reflux disease, and asthma. AR 18. The ALJ did not find that Plaintiff had any severe, medically determinable impairment or combination of impairments that would significantly limit his ability to do work-related tasks and could be expected to last twelve or more months. AR 19.

Thus, the ALJ determined that Plaintiff was not disabled and did not proceed beyond step two of the five-step sequential evaluation process. AR 24. The ALJ reached this determination by giving little weight to Plaintiff' subjective symptom testimony and the opinions of consultative medical examiner Gary Gaffield, D.O., as well as non-examining medical consultants Charles Wolfe, M.D., and Guillermo Rubio, M.D. AR 20–24.

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2 A. Whether the ALJ's Step Two Finding was Proper

3 The Commissioner uses a five-step sequential evaluation process to determine if
4 a claimant is disabled. 20 C.F.R. § 416.920. At step two of the sequential evaluation,
5 the ALJ must determine if a claimant has a “severe medically determinable physical
6 or mental impairment.” 20 C.F.R. § 404.1520, § 416.920. A medically determinable
7 impairment is one which results from “anatomical, physiological, or psychological
8 abnormalities that can be shown by medically acceptable clinical and laboratory
9 diagnostic techniques[.]” Social Security Ruling (“SSR”) 16-3p, 2017 WL 5180304, at *3.
10 A medically determinable impairment is considered “severe” if it “significantly limits [a
11 claimant’s] physical or mental ability to do basic work activities. . . .” 20 C.F.R. §§
12 404.1520(a)(4)(iii) & (c), 416.920(a)(4)(iii) & (c).

13 Basic work activities are those “abilities and aptitudes necessary to do most
14 jobs,” including, for example, “walking, standing, sitting, lifting, pushing, pulling,
15 reaching, carrying or handling; capacities for seeing, hearing and speaking;
16 understanding, carrying out, and remembering simple instructions; use of judgment;
17 responding appropriately to supervision, co-workers and usual work situations; and
18 dealing with changes in a routine work setting.” 20 C.F.R. §§ 404.1521(b), 416.921(b);
19 SSR 85-28, 1985 WL 56856, at *3.

20 The step two inquiry, however, is merely a threshold determination as to whether
21 a claimant has raised a “prima facie case of a disability.” *Hoopai v. Astrue*, 499 F.3d
22 1071, 1076 (9th Cir. 2007); *see also Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir.
23 1996) (noting the step two determination is a *de minimis* screening device used to
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1 dispose of groundless claims). “Ample authority cautions against a determination of
2 nondisability at step two.” *Ortiz v. Commissioner of Social Sec.*, 425 Fed.Appx. 653, 655
3 (9th Cir. 2011) (citing *Bowen v. Yuckert*, 482 U.S. 137, 153 (1987)); *Webb v. Barnhart*,
4 433 F.3d 683, 686 (9th Cir.2005), *Smolen*, 80 F.3d at 1290. An impairment or
5 combination of impairments may be found “not severe only if the evidence establishes a
6 slight abnormality that has no more than a minimal effect on an individual’s ability to
7 work.” *Smolen*, 80 F.3d at 1290. “If an adjudicator is unable to determine clearly the
8 effect of an impairment or combination of impairments on the individual’s ability to do
9 basic work activities, the sequential evaluation should not end with [step two.]” SSR 85-
10 28, 1985 WL 56856, at *4.

11 In *Webb v. Barnhart*, the Ninth Circuit articulated a test to determine whether an
12 ALJ properly finds a claimant to be not disabled at step two. First, an ALJ must find the
13 medical evidence of record “clearly establish[es]” a claimant did not have a medically
14 severe impairment or combination of impairments. *Webb*, 433 F.3d at 686–87. Second,
15 an ALJ must support this finding with substantial evidence. *Id.*

16 Here, Plaintiff submitted evidence establishing he had the medically determinable
17 impairment of right shoulder degenerative joint disease since at least 2016. AR 428.
18 Among the evidence Plaintiff submitted were the medical opinions of Gary Gaffield,
19 D.O., and notes from Plaintiff’s treating medical sources at Madigan Army Medical
20 Center. See, e.g. AR 421–90, 498–506.

21 Dr. Gaffield reviewed Plaintiff’s orthopedic treatment records and administered
22 his own physical examination in addition to interviewing Plaintiff about his medical
23 history, and based upon this evaluation, Dr. Gaffield diagnosed Plaintiff with
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1 1. Right shoulder weakness with marked restricted motion and history of a
2 rotator cuff tear. It does not impact his grip or dexterity.

3 2. Mild restricted cervical motion with a history of underlying fractures. No
4 radiculopathies.

5 3. Slight weakness of the right knee without restricted motion with a
6 history of ACL tear.

7 4. Asthma by report. He carries medications.

8 5. Obstructive sleep apnea using a CPAP machine with good results.

9 AR 505.

10 Based on his assessment of these impairments, Dr. Gaffield opined that Plaintiff
11 would be limited to lifting not more than 20 pounds occasionally and 10 pounds
12 frequently, could perform postural activities occasionally, could not reach or work
13 overhead for prolonged periods of time, and should avoid working at heights, operating
14 heavy equipment, navigating scaffolding or irregular surfaces, or working around
15 temperature extremes, gases, chemicals or fumes. AR 505–06. These reports were
16 consistent with Plaintiff's subjective testimony as well as longitudinal history of his
17 shoulder problems. See, e.g., AR 50–51, 53, 56–58, 428, 499–500.

18 Although these reports were contradicted by other evidence upon which the ALJ
19 relied, the conflict and ambiguity in the record demonstrates that Plaintiff's claim is at
20 least debatable; thus, it has not been clearly established that Plaintiff's condition is non-
21 severe. *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir.2005); see *Franklin v. Astrue*,
22 2012 WL 3059407, at *3 (W.D. Wash. 2012); compare *Ukolov v. Barnhart*, 420 F.3d
23 1002 (9th Cir. 2005) (finding claimant offered no objective medical evidence in support
24 of claim that medically determinable impairments were severe).

1 The ALJ found Plaintiff's complaints regarding his shoulder to be inconsistent
2 with findings that this impairment "is adequately treated with steroid injection and results
3 in no significant limitation to [Plaintiff]'s ability to perform basic work activities." AR 21.
4 As in *Webb*, this reason -- when balanced against the contemporaneous observations
5 of Plaintiff's doctors, objective tests, and Plaintiff's subjective complaints -- is not
6 supported by substantial evidence.

7 The ALJ's summary of this evidence includes Plaintiff's reports that steroid
8 injections provided some relief from his shoulder pain. However, the persistent shoulder
9 impairment is well-documented through Plaintiff's testimony and objective medical
10 evidence, including x-rays and physical exams. See AR 44–45 (Plaintiff needed a
11 second person for a one-person lifting task), 50–51 (steroid injections do not last full
12 three to four months, but provide "50 percent" pain relief in first month); 56 (Plaintiff
13 testified that he could not lift more than 20 pounds at a time), 499 (x-ray showing "[m]ild
14 acromioclavicular arthritis" in right shoulder). The evidence cited by the ALJ does not
15 contradict Plaintiff's testimony. "That a person who suffers from severe [symptoms]
16 makes some improvement does not mean that the person's impairments no longer
17 seriously affect her ability to function in a workplace." *Holohan v. Massanari*, 246 F.3d
18 1195, 1205 (9th Cir. 2001).

19 As for the medical evidence, the ALJ found that Dr. Gaffield's opinion on
20 Plaintiff's limitations had no objective support. The ALJ did contrast Dr. Gaffield's
21 findings to the absence of comparable findings by his medical providers. Tr. 23. But this
22 overlooks the fact that Plaintiff's medical providers did not conduct examinations
23 comparable to that provided by Dr. Gaffield. The ALJ also noted that Plaintiff
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1 “consistently obtained significant relief from injections,” Tr. 23. But the same records
2 documenting relief also show that Plaintiff consistently needed injections in his shoulder
3 for relief. Tr. 608 (noting shoulder pain was “long standing” as of June 2016); 609
4 (November 2017 injection); 607 (June 2018 injection); 601–02 (November 2018
5 injection); Tr. 600 (February 2019 injection).

6 In addition, both state agency physicians echoed most of Dr. Gaffield’s
7 recommendations. At the initial level, Dr. Charles Wolfe indicated that Plaintiff would be
8 limited to light work, with limited push/pull in the upper and lower extremities; that he
9 would be capable of only occasional postural activities, except for balancing (unlimited);
10 that he would be limited in overhead work with his right upper extremity; and that he
11 should avoid concentrated exposure to fumes, odors, dust, gases, poor ventilation, and
12 hazards. Tr. 89–91. Dr. Wolfe explained the factual basis of his findings, relying on the
13 record as it stood, as well as Dr. Gaffield’s exam. Tr. 86–87. At the reconsideration
14 level, Dr. Guillermo Rubio concurred with Dr. Wolfe’s opinion, relying on essentially the
15 same evidence. Tr. 99, 101–03.

16 In any event, as in *Webb*, the issues the ALJ identified with Drs. Gaffield’s,
17 Rubio’s, and Wolfe’s opinions are not “sufficient to doom [Plaintiff’s] claim as groundless
18 under the de minimis standard of step two.” *Webb*, 433 F.3d at 687. Drs. Gaffield’s,
19 Rubio’s and Wolfe’s reports are not only consistent with Plaintiff’s complaints, but are
20 also supported by objective medical evidence. See AR 82–93, 95–105, 499–505. This
21 evidence is sufficient for Plaintiff to have met his burden to present evidence of a severe
22 impairment. See, e.g., *Webb*, 433 F.3d at 687; *Ortiz*, 425 Fed.Appx. at 655; *Franklin*,
23 2012 WL 3059407, at *3.

1 The ALJ lacked substantial evidence to find the record clearly established
2 Plaintiff did not have a medically severe impairment. Thus, the ALJ committed harmful
3 error by ending the sequential evaluation at step two.

4 2. Remand for Further Proceedings

5 The Court may remand a case “either for additional evidence and findings or to
6 award benefits.” *Smolen*, 80 F.3d at 1292. Generally, when the Court reverses an ALJ’s
7 decision, “the proper course, except in rare circumstances, is to remand to the agency
8 for additional investigation or explanation.” *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th
9 Cir. 2004) (citations omitted). On remand the ALJ must re-evaluate the medical opinion
10 evidence, the Plaintiff’s statements, and lay witness statements. *See supra* Section A.
11 The lack of findings at steps three, four, and five of the sequential evaluation are
12 outstanding issues requiring resolution before a disability determination can be properly
13 made. Therefore, a remand for further proceedings is the appropriate remedy.

14 CONCLUSION

15 Based on the foregoing discussion, the Court finds the ALJ erred when she
16 determined plaintiff to be not disabled. Defendant’s decision to deny benefits therefore
17 is REVERSED and this matter is REMANDED for further administrative proceedings.
18 The ALJ is directed to: offer Plaintiff an opportunity for another hearing; further evaluate
19 the medical opinions and obtain additional medical evidence if an expansion of the
20 record would be useful; further evaluate Plaintiff’s functional capacity, including ordering
21 an examination if necessary; re-evaluate Plaintiff’s testimony and subjective statements
22 about symptoms; and if necessary, take vocational evidence to evaluate Plaintiff’s
23 residual functional capacity and resolve any apparent conflicts between the vocational
24 expert’s testimony and the Dictionary of Occupational Titles; and, if step five is reached,
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1 make findings at step five as to whether Plaintiff may perform other jobs that exist in
2 significant numbers in the national economy.

3 Dated this 8th day of November, 2021.

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Theresa L. Fricke
7 United States Magistrate Judge
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